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Palace Sports & Entertainment, Inc. d/b/a St. Pete times Forum f/k/a Tampa Bay Ice Palace *and* International Alliance of Theatrical Stage Employees, AFL–CIO.[1] Cases 12–CA–21696, 12–CA–22596, and 12–CA–22623

Palace Sports & Entertainment, Inc. d/b/a St. Pete Times Forum f/k/a Tampa Bay Ice Palace *and* Thomas W. Roberts. Case 12–CA–23038[2]

July 27, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On July 22, 2003, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and Respondent filed a reply brief. The General Counsel also filed exceptions and Respondent filed an answering brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order and notice as modified.[5]

We agree with the judge that the Respondent violated Section 8(a)(1) and (3) when it discharged employee Peter Mullins on November 3, 2002. The judge found that Mullins had engaged in union activity and that the Respondent was fully aware of that activity. The judge also found specific animus against Mullins and that Mullins' discharge was an adverse action affecting the terms and conditions of his employment. We agree with these findings. Thus, the General Counsel made the required initial showing that Mullins' union activity was a substantial or motivating factor in his discharge. *Manno Electric*, 321 NLRB 278, 280–281 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–403 (1982).

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[1] We have corrected the case caption and the Order to reflect the proper name of the Charging Party, pursuant to the General Counsel's unopposed motion.

[2] This case is before the Board solely with regard to the Respondent's request for special permission to appeal (Appeal #04-22), and this case has not been consolidated with Cases 12–CA–21696, et al.

[3] There are no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(1) by its restatement of its no-solicitation rule during a meeting with employees on July 1, 2001 or by its July 18, 2001 statement that employees could be terminated for violating the no-solicitation rule.

[4] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

For the reasons stated by the judge, we find that the Respondent did not violate Sec. 8(a)(1) and (3) by refusing to hire applicant Lewis Taylor. In dismissing this allegation, we find it unnecessary to pass on the judge's finding that Taylor's alleged threat of "labor strife" if he was not hired was unprotected.

We also adopt the judge's recommendation to dismiss the 8(a)(1) allegation that the Respondent coerced employees when it stated that the "Union was out of the building" as of July 1, 2001. We agree with the judge that this statement does not establish the complaint allegation that the Respondent's vice president, Sean Henry, informed the employees that the Union would no longer be their collective-bargaining representative as of July 1, 2001.

We find it unnecessary to pass on the 8(a)(1) allegation based on the Respondent's Operations Manager Carson Williams' statement in the presence of employee Freire that if Williams found out who was going to the NLRB, there was going to be "trouble." The General Counsel argues in his brief in support of exceptions that Williams' remark constitutes a threat of unspecified reprisals for cooperating in a Board investigation. Even if we were to reverse the judge's recommended dismissal of this allegation and find a violation, such a violation would in any event be cumulative to our adoption of the judge's finding in the preceding paragraph of his decision of another 8(a)(1) threat by Williams of unspecified reprisals for cooperating in a Board investigation.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by disciplining employee Peter Mullins on July 25, 2002, for violating its no-solicitation rule, Member Schaumber relies solely on the judge's conclusion that, under Mullins' version of what transpired, which the judge credited, Mullins did not violate the Respondent's rule.

[5] We have modified the judge's recommended Order to reflect that the Respondent's first unfair labor practice was on July 18, 2001. *Excel Containers, Inc.*, 325 NLRB 17 (1997). Additionally, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

On July 31, 2003, the Regional Director issued a complaint in Case 12–CA–23038 alleging, in part, that the Respondent violated Sec. 8(a)(3) and (4) by discharging employee Thomas Roberts because of his union activities and because he cooperated in the Board's investigation of the charges filed in this case. On January 14, 2004, the Regional Director postponed the hearing in Case 12–CA–23038 indefinitely, pending the Board's decision in this case. Thereafter, the Respondent filed a motion to proceed with the hearing or dismiss the complaint. Associate Chief Judge William Cates denied the Respondent's motion by order dated January 28, 2004. Thereafter, the Respondent filed a request for special permission to appeal the administrative law judge's ruling. Because the Board has now issued a decision in this case, we grant the Respondent's request for special permission to appeal and we direct the Regional Director to schedule the hearing in Case 12–CA–23038.

Under *Wright Line*, the burden then shifted to the Respondent to show that it would have discharged Mullins even in the absence of his protected, concerted activities. The Respondent contended that it discharged Mullins because of its apprehension of potential hostile environment sexual harassment liability under Title VII of the Civil Rights Act of 1964, arising out of an encounter between Mullins and Alice Castillo, an employee of a vendor doing business on the Respondent's premises. According to Castillo, Mullins initiated a conversation about the merits of unionization and when she expressed some skepticism, Mullins called her a "Yankee bitch." Respondent argued that Mullins' angry outburst at Castillo created sufficient concern for Title VII liability that it discharged him.

The judge credited Mullins' testimony that he did not make any offensive statement to Castillo. The judge nevertheless concluded that the Respondent could rely on its good faith belief that Mullins had engaged in this conduct. Analyzing the case under the *Wright Line* framework, the judge concluded that the Respondent did not establish that Mullins would have been discharged even in the absence of his union activity because Mullins' comment did not, in the judge's view, constitute a sexual advance.[6]

We agree with the judge that the Respondent failed to show that it would have discharged Mullins even in the absence of his union activity in order to avoid the imposition of Title VII liability.[7] We recognize that employers have a legitimate interest in preventing workplace sexual harassment and a correlative obligation to respond when such incidents occur. In this case, however, we find that the Respondent has not established that it had reasonable grounds for determining that it had to ~~remove or discipline Mullins in or~~der to avoid liability pline Mullins in order to avoid liability under Title VII.[8] Indeed, the Respondent's director of human resources, Beth Fields, admitted at the hearing that she did not believe that Mullins sexually harassed Castillo. In these circumstances, we agree with the judge that the Respondent's asserted Title VII concerns are pretextual.[9]

In rejecting the Respondent's Title VII defense, we are mindful of the admonition of the United States Court of Appeals for the District of Columbia Circuit in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001), that the Board should interpret the Act in a manner which is sensitive to employers' responsibilities to address workplace harassment. This case, however, does not present the issues that were of concern in *Adtranz*. At issue in that case was the employer's maintenance of a policy prohibiting "abusive or threatening language" on company premises. Here, on the other hand, the question presented is whether the Respondent discharged Mullins because he was a union supporter. Under the established principles set forth in *Wright Line*, supra, once the General Counsel made the required initial showing that Mullins' union activity was a motivating factor in the decision to discharge him, the burden shifted to the Respondent to show that it would have discharged him even in the absence of his union activities, here, because of its Title VII concerns. For the reasons set forth above, we have found that the Respondent failed to make that showing. That finding is based on the specific facts of this case, and thus does not raise the issue of interfering with employers' Title VII responsibilities generally that was of concern to the court in *Adtranz*.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, St. Pete Times Forum, Tampa, Florida, its officers, agents, suc-

[6] The General Counsel and Respondent's exceptions do not take issue with the analytical framework applied by the judge.

[7] Member Schaumber notes that the test established in *Wright Line* was a causation test under which the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was a substantial or *motivating* factor for the adverse employment action. The Board, administrative law judges, and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. As noted in *Shearer's Foods, Inc.*, 340 NLRB No. 132, slip op. at 2 fn. 4 (2003), Member Schaumber agrees with this addition to the *Wright Line* formulation. It is not necessary to address the issue here, however, because the General Counsel has met his initial burden under *Wright Line*. Member Schaumber agrees with his colleagues that the Respondent did not meet its burden under *Wright Line* of showing that it would have *discharged* Mullins in the absence of his union activity; however, he is of the view that the imposition of some form of discipline short of discharge may have been justified.

[8] The Supreme Court has held that a single, isolated comment generally is not sufficient to justify the imposition of Title VII liability. *Clarke County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). Moreover, even where an employee has been shown to have sexually harassed a co-worker, Title VII does not necessarily require the employee's discharge, so long as the employer takes reasonable action to protect the complainant from further harassment. *Baskerville v. Culligan International Co.*, 50 F.3d 428, 432 (7th Cir. 1995).

In finding that the Respondent has not shown that its decision to discharge Mullins was justified by Title VII concerns, we do not, however, rely on any implication in the judge's decision that Title VII sexual harassment liability attaches only to comments containing sexual advances or propositions.

[9] A finding that an employer's stated reason for taking disciplinary action is a pretext supports an inference that the real motive was unlawful. *ADS Electric Co.*, 339 NLRB No. 128, slip op. at 4 (2003).

cessors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Warning, discharging, or otherwise discriminating against any employee for supporting International Alliance of Theatrical Stage Employees, AFL–CIO, or any other labor organization."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facilities in Tampa, Florida copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2001."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 27, 2004

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT warn, discharge, or otherwise discriminate against any of you for supporting International Alliance of Theatrical Stage Employees, AFL–CIO, or any other labor organization.

WE WILL NOT prohibit you from talking about the Union except on non-working time, while permitting other conversation.

WE WILL NOT interrogate you regarding your knowledge of employee union activity and WE WILL NOT direct you to report upon the union activities of your coworkers.

WE WILL NOT interrogate you regarding your communications with the National Labor Relations Board and WE WILL NOT threaten you with unspecified reprisals if you cooperate in a Board investigation.

WE WILL NOT threaten you with discharge because of your support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Peter Mullins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Peter Mullins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of Board's Order, remove from our files any reference to the unlawful warnings and discharge of Peter Mullins, and WE WILL, within 3 days thereafter notify Peter Mullins in writing that this has been done and that the warnings and discharge will not be used against him in any way.

PALACE SPORTS & ENTERTAINMENT, INC. D/B/A ST. PETE TIMES FORUM F/K/A TAMPA BAY ICE PALACE

Thomas W. Brudney, Esq., for the General Counsel.
Robert M. Vercruysse and *Gary S. Fealk, Esqs.*, for the Respondent.
Kathryn S. Piscitelli, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Tampa, Florida, on May 27, 28, and 29, 2003.[1] The consolidated complaint issued on December 31, 2002.[2] The complaint alleges various violations of Section 8(a)(1) of the National Labor Relations Act and the failure to hire one employee because of his union activities and the warning and discharge of Peter Mullins because of his union activities in violation of Section 8(a)(3) of the Act. The Respondent's answer denies any violation of the Act. I find that certain actions of the Respondent did violate Section 8(a)(1) of the Act, that the failure to hire did not violate the Act, but that the warning and discharge of employee Peter Mullins did violate the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Palace Sports & Entertainment, Inc., d/b/a St. Pete Times Forum, the Company, is a corporation engaged in the management and operation of sports and entertainment venues. The Company annually derives gross revenues in excess of $500,000 from its business operations and annually purchases and receives at its Tampa, Florida facility goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I conclude and find, that International Alliance of Theatrical Stage Employees, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company is a national enterprise headquartered in Detroit, Michigan, where it operates a highly successful sports and entertainment arena, the Palace of Auburn Hills, Michigan. In 1999, the Company acquired what was then known as the Ice Palace in Tampa, Florida. The Company assumed various contractual obligations that had been made by the Ice Palace, including a contract with a company referred to as SMG which employed fulltime employees who maintained the facility and part-time employees who provided the labor to make the changeovers necessary to convert the floor of the facility from an ice rink for professional hockey to a stage for performers or a dirt track for monster trucks.

SMG and the Union were parties to a collective-bargaining agreement that expired on June 30, 2001, the same date that SMG's contract with the Ice Palace expired. As of early May, the Company had determined that it would become the employer of the employees who maintained the facility and provided the labor for changeovers. On May 6 and 7, 2001, Vice President Sean Henry informed the SMG employees of its plans and advised that they could apply for positions that would soon be posted. The positions were posted in late May and job interviews were conducted beginning on May 29. The Company is not alleged to be a successor. Several prounion bargaining unit employees, including Secretary/Treasurer Pamela Johnson, employee Donald Bates, and employee Peter Mullins began soliciting authorization cards from their fellow employees; however, no representation petition was filed.

In 2002, the Union again solicited authorization cards. On October 21, a representation petition was filed. An election was conducted in November in which a majority of the employees in the appropriate unit rejected representation.

The issues in this case relate to statements purportedly made by various management officials in 2001 and 2002, the failure of the Company to hire Lewis Taylor in June 2001, and the discipline of employee Peter Mullins in July 2002 and his termination in November 2002.

B. The Refusal to Hire

1. Facts

Lewis Taylor had worked as a maintenance employee and carpenter with SMG since 1996 when the facility opened as the Ice Palace. On May 25, 2001, he was elected president of the local at Tampa. The names of the officers elected at that meeting were posted on the union bulletin board. Prior to May 2001, the local union had no officers. The only formal union position was that of shop steward, and that position was filled by employee Andy Lalewicz. Employee Peter Mullins had been on the negotiating committee for the collective-bargaining agreement between the Union and SMG. On May 25, 2001, when Taylor was elected President, Lalewicz was elected business representative, Johnson was elected secretary/treasurer, and Mullins and George Freire were elected as delegates.

Taylor applied for a position with the Company and was interviewed. The interviews were conducted by Vice President Sean Henry, Director of Human Resources Beth Fields, and Operations Manager Carson Williams. Taylor recalls that his interview had initially been scheduled in the morning but was moved to the afternoon. Taylor had been working all day. SMG had no dress code. Taylor had shoulder-length hair and a full beard. Since he had been working, he was sweaty and covered with sawdust.

Taylor, who placed the interview on May 17, 2001, recalls that, as he came into the meeting, Vice President Henry "shook my hand and congratulated me." He testified that, even though this was prior to the interview, he thought he had the job. This apparent nonsequitur was clarified by Fields who explained that

[1] All dates are in 2002 unless otherwise indicated.

[2] The charge in Case 12–CA–21696 was filed on July 30, 2001, and was amended on January 3. The charge in Case 12–CA–22596 was filed on November 4, and the charge in Case 12–CA–22623 was filed on November 15.

all interviews were on or after May 29, 2001, after the May 25 election of Taylor as President of the local. Henry recalls congratulating Taylor upon his election. Taylor denied that the Union was mentioned in any way during the meeting. He recalls being informed that the Company was changing the supervisory structure and that he would be reporting to Carson Williams. Taylor indicated that he had no problem in that regard. He was also told that the Company had a dress code and that he would have to be clean-shaven and have his hair cut. Taylor responded that he had no problem in complying.

Vice President Henry testified that Taylor had grime on his clothes, was disheveled, and exuded a rank odor that included alcohol, which reminded him of "Bourbon Street at 7:00 a.m." He recalled that, as he was describing the Company's goals, Taylor would "snort and dismiss it," and that he found this disconcerting since it was Taylor who was being interviewed. At one point, Henry addressed Taylor, asking why the Company should hire him and Taylor replied that the Company had to hire him, otherwise "you are going to have problems." Henry asked what kind of problems and Taylor replied, "labor problems, . . . lock downs, . . . [s]hows will be cancelled." Henry suggested that everyone take a break, and Taylor said, "Just give me my paperwork so I can sign it and move on."

Director of Human Resources Fields confirms that Taylor was covered with sawdust. She noted that he had not bothered to wash his hands. Moreover, Taylor's eyes were bloodshot, and he exuded body odor and the smell of alcohol. His clothing appeared dirtier that it would have been had he started the day wearing clean clothing. She recalled Taylor stating that if he were not hired, there would be "labor strife." At the conclusion of the meeting he stated, "Just give me the paperwork and I'll sign it, and we can be done with this."

Operations Manager Williams confirmed that Taylor was dirty and smelled of sweat and alcohol. He noted that, upon hearing management's objectives, Taylor's reaction was "very negative." Upon the conclusion of the meeting, Williams did not want to hire Taylor.

Taylor was not offered a position. Although there had been some friction between Taylor and his immediate supervisor, there is no contention that the friction related to the Company's decision not to hire Taylor. There is no probative evidence that Taylor's job performance with SMG related to the employment decision; rather, it resulted from his interview. Union officers Lalewicz, Johnson, Mullins, and Freire were all hired.

On December 27, 2002, a year and a half after the Company did not hire him, Taylor wrote his former supervisor, Tim Friedenberger, and expressed regret for past problems with him. He also acknowledged a past problem with alcohol and drugs. Taylor stated that he had discontinued his affiliation with the Union and offered to "fight to keep them [the Union] out." Despite his changed attitude towards the Union, Taylor did not assert that he considered that affiliation to have affected his employment. The letter states, "I have known and realized that the drugs and drinking and letting people in my head . . . screwed me out of a good job."

2. Analysis and concluding findings

The Respondent acknowledges that it was aware of Taylor's union activities. As already noted, he was congratulated upon his election as local president at his job interview. Pursuant to the analytical framework set out in *FES*, 331 NLRB 9 (2000), I find that the Respondent was hiring and that Taylor was qualified for the job for which he applied. The third criteria set out in *FES* is whether antiunion animus contributed to the decision not to hire the applicant.

It is undisputed that Taylor, unlike the neatly groomed, clean-shaven witness who appeared at the hearing, had long hair and a full beard in late May 2001. The presence of sawdust on his clothing and in his hair and beard when he came to his job interview was understandable because he had been working. The description by Henry and Fields of the body odor Taylor exuded exceeded what would have been expected had Taylor been clean when he began the workday. There is no claim that Taylor was inebriated at the meeting. He denied that he smelled of alcohol or that he had drank during the day or to excess the night before this meeting. His acknowledgement in his December 27, 2002, letter of a past problem with drugs and alcohol diminishes the credibility of that denial. In *Clock Electric, Inc.*, 323 NLRB 1226, 1233 (1997), the respondent refused to hire an electrician whose "hair was matted, his clothes were dirty, and he exuded an obnoxious body odor in addition to the smell of alcohol on his breath." In finding the failure to hire justified, the administrative law judge determined that the respondent was "rightfully concerned about . . . [his] appearance and odor."

Although the Respondent denies animus towards the Union, as discussed, I find that the Respondent did bear animus towards employee union activity. Notwithstanding the presence of animus, the Respondent hired former shop steward Lalewicz, the one individual who actually held a position with the Union prior to May 2001, as well as Secretary/Treasurer Johnson, negotiator Mullins, and newly elected delegate George Freire. Unlike Johnson and Mullins, there is no evidence that Taylor solicited union authorization cards in May and June 2001 immediately prior to the Respondent becoming the employer. The only prounion employee shown on this record not to have been offered a position was Taylor.

The General Counsel argues that the Respondent's witnesses should not be credited regarding the manner in which Taylor presented himself and that, even if I credit their testimony regarding Taylor's alleged remarks regarding "labor strife," that a "union official's threat to create labor problems unless hired does not bring the official outside the scope of Section 7 protection." No case authority is cited for the foregoing proposition, and I am unaware of any case authority establishing that a threat to take actions that would interfere with an employers' business in retaliation for a hiring decision is protected activity.

The mutually corroborative testimony of Henry, Fields, and Williams confirms that Taylor's attitude left as much to be desired as did his appearance. Taylor denied that there was any mention of the Union at the meeting or that he made any statements relating to labor strife. He did not deny that, as the meeting was concluding, he stated, "Just give me the paperwork and I'll sign it, and we can be done with this." Taylor's undenied

parting remark is consistent with the negative attitude that the Respondent's management officials testified Taylor displayed throughout the interview. The Respondent has established that its decision not to offer a position to Taylor resulted from Taylor's presentation of himself at the job interview and was not motivated by antiunion animus. I shall recommend that this allegation be dismissed.

C. The 8(a)(1) Allegations

The complaint alleges that about May 6, 2001, at one of the meetings when the Company announced it would become the employer rather than SMG, Vice President Sean Henry and Director of Human Resources Beth Fields promised employees wage increases and benefits if they stopped supporting the Union. The complaint further alleges that Henry informed employees that the Union would no longer be their collective-bargaining representative as of July 1. Although Henry and Fields did inform employees of the application process and did mention the benefits offered by the Company, both credibly testified that no specific wage rates were mentioned. None of the foregoing statements were related to the Union in any way. Peter Mullins recalled that Henry, whom he had spoken with prior to the meeting regarding the status of the Union, "kept reiterating . . . that it would be up to the employees." Employee Pam Johnson acknowledged that Henry stated, "What you do about the Union is your business." Henry credibly testified that, when he was asked whether the employees would continue to be represented, he replied that it was "not up for us [the Company] to decide if the Union was going to be in there or not, our employees would decide." Johnson also recalls Henry saying that "as of July 1, the union contract was over and that it was out of the building." Johnson's testimony does not establish the complaint allegation that the Union would no longer be the employees' collective-bargaining representative. There is no allegation that the Company was a successor, and even if it were, it could set initial terms and conditions of employment. Upon expiration of the contract on June 30, 2001, the Union's privilege to maintain a bulletin board and obtain access for representatives, privileges obtained through the contract, not rights guaranteed by the Act, ceased. I shall recommend that the foregoing allegations be dismissed.

> On June 27, 2001, the Company posted the following valid solicitation rule:
>
> Solicitation of any kind, by one employee to another, is prohibited while either is working. Working time is when an employee's duties require that he/she be engaged in work tasks. Working time does not include an employee's own time, such as meal periods, scheduled breaks, time before and after a shift and personal cleanup time. We believe that you should not be disturbed or disrupted in the performance of your job. Solicitation by nonemployees on Ice Palace or Palace Sport & Entertainment's premises is prohibited at all times.

The complaint alleges that, on July 1, 2001, Supervisor Tim Friedenberger informed employees that all soliciting was prohibited, and that in mid-July he threatened employees with discharge for soliciting on behalf of the Union on Ice Palace property. Employee Donald Bates recalled that, shortly after July 1, Supervisor Friedenberger requested him to remove union materials from the bulletin board to which the Union had access pursuant to the collective-bargaining agreement that had expired on June 30, 2001. Bates recalled that he asked why Friedenberger was making the request and that Friedenberger replied "there was no soliciting in the building at all." Friedenberger denied making any statement relating to solicitation other than reading the policy to employees at a meeting. The only testimony relating to a threat of discharge by Friedenberger is that of employee Jarvis Sheeler who recalled that, before a concert, the conversion supervisors and conversion techs, all statutory employees, were called to a meeting at which Supervisor Friedenberger reiterated that there was a no solicitation policy and that "if people were caught handing out any type of union cards and/or solicitations, there would be disciplinary actions against them." There is no corroboration whatsoever from any other employee who attended this meeting that Friedenberger orally promulgated an unlawful rule broader than the published rule and accompanied it with a threat. I credit Friedenberger's denial that he did so. The Respondent had the right to deny the Union access to the bulletin board upon expiration of the collective-bargaining agreement. Bates' testimony was clear regarding what he was directed to do. Friedenberger denied directing that union materials be removed or making any statement prohibiting all solicitation. Insofar as the Respondent was privileged to deny the Union access to a bulletin board, there would have been no reason for Friedenberger not to have admitted doing so if, in fact, he had been the individual that had directed that action. Although I credit Bates regarding the transaction, I find that he was mistaken regarding the identity of the individual who spoke with him. Having found that Supervisor Friedenberger was not the individual involved, there is no evidence that the individual who spoke with Bates was a supervisor of the Respondent. I shall, therefore, recommend that the foregoing allegations attributed to Supervisor Friedenberger be dismissed.

On July 18, 2001, the Company held a meeting at which Director of Human Resources Fields was to explain various benefits. Prior to Fields' beginning her presentation, Vice President Henry addressed the employees. The complaint alleges that Henry threatened employees with discharge for engaging in union activities and promulgated a rule prohibiting talking about the Union while permitting employees to discuss other subjects.

Henry recalls that, prior to this meeting, several employees, none of whom he named, reported to him that they had been coercively solicited on behalf of the Union. He testified that those employees refused to identify the individual or individuals who had allegedly coercively solicited them and that he did not press the matter. Despite the unwillingness of the reporting employees to give Henry the information that he needed in order to properly investigate the complaint, he did address the solicitation policy at the beginning of the meeting. He testified that he reviewed the policy and noted that if someone violated that policy, "no matter what they were soliciting for," they could be terminated. Henry recalled explaining "you can't solicit for Girl Scout cookies, Amway, church raffles, Little League candy bars," noting that solicitation when working was

a "detraction from what we all do, [s]o, let's reserve that for when we are on breaks, when we are walking in the building, when we are at lunch and truly not bother each other with it." Henry acknowledged that he also said, "[W]hen you are on break, when you are on lunch, and obviously before work and after work you can talk about what you would like to talk about. You can solicit each other. You know, you can talk about virtually anything you want. But during working time you can['t] solicit for any initiative, whatever it may be."

Fields recalled that Henry told the employees that he "didn't care if they were soliciting for union cards, or Amway or Avon or Girl Scout cookies or for the Boy Scouts but that it could not happen during working time." Employee Pam Johnson recalls Henry stating that he had been "approached by several people coming to him complaining that people were trying to coerce them into signing union cards and that he wanted it to stop. And that anybody . . . caught doing this would be terminated." Henry continued stating that he "didn't care if we talked about Amway, Boy Scout cookies, Avon, just not the Union."

Employee Peter Mullins testified that, after condemning coercive solicitation, Henry referred to talking, stating that "we were allowed to talk about Amway, Avon, Boy Scouts, Girl Scouts, but if we talked about the Union we would be fired."

Complaints regarding solicitation on behalf of the Union were what prompted Henry to address the employees regarding the solicitation policy. Despite this, when testifying to the remarks that he made, Henry did not include the Union in the list of organizations for which there should be no solicitation except on nonworking time. His omission of the very organization that prompted his comments from the list he recited gives credence to the testimony of Johnson and Mullins that the list was of organizations employees could talk about, "just not the Union." Henry admitted informing the employees that solicitation in violation of the Respondent's rule could result in termination. There was no violation in that regard, and I shall recommend that the allegation that the Respondent threatened employees with discharge for engaging in union activities be dismissed. Consistent with the testimony of Johnson ("didn't care if we talked about Amway, Boy [sic] Scout cookies, Avon, just not the Union") and Mullins, ("we were allowed to talk about Amway, Avon, Boy Scouts, Girl Scouts, but if we talked about the Union we would be fired"), I find, as alleged in the complaint, that Henry did promulgate a rule prohibiting conversation regarding the Union. Henry's admission that he told employees that they could "talk about virtually anything" but could not solicit on working time, together with the credible testimony of Johnson and Mullins, establishes that "virtually anything" excluded the Union because Henry viewed any discussion regarding the Union as solicitation. An employer may not restrict union-related conversation while permitting conversation relating to other topics. *Opryland Hotel*, 323 NLRB 723, 728–729 (1997). By prohibiting employees from talking about the Union except on nonworking time, while permitting other conversation, the Respondent violated Section 8(a)(1) of the Act.

The remaining 8(a)(1) allegations relate to conduct by Operations Manager Carson Williams.

The complaint alleges that, in early July 2001, Williams interrogated employees regarding their union activities and directed them to report upon the union activities of their coworkers. Employee Thomas Roberts recalls that, in mid-July, he was at the loading dock heading towards the freight elevator when he encountered his immediate supervisor, Carson Williams. Operations Manager Williams asked Roberts whether "anybody [had] approached me about the union organization process, things like that." Roberts responded that no one had. Williams then stated, "I know if anyone comes to you, you will let me know." Roberts replied, "Well, either way I don't want to say yes, I will come to you or no, I won't come to you. I just want to come in to do my job."

Williams denied having any conversation in July 2001 with Thomas Roberts in which he discussed the Union. Although making several general denials, Williams was not asked and did not deny stating to Roberts, "I know if anyone comes to you, you will let me know." The foregoing conversation related to the union activities of employees, not the Union itself; thus, Williams' denial of having discussed the Union with Roberts was, literally, truthful. I credit Roberts. Williams' conversation with Roberts was coercive. Williams was probing to determine the extent of union activity among the employees. The existence of that activity is established by Henry's testimony that employees had complained to him regarding alleged coercive solicitations. When Roberts initially denied having any knowledge of employee union activity, Williams continued, not asking a question, but stating to an employee whom he directly supervised that he knew the employee would let him know if anyone came to him regarding union organizational efforts. In the face of this supervisory direction, Roberts responded that he just wanted "to come in to do my job." By interrogating employees regarding their knowledge of employee union activity and directing them to report upon the union activities of their coworkers, the Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that, in mid-July 2001, Williams prohibited employees from talking about the Union. Employee George Freire spoke with a new employee, Carlos Gonzales, regarding the Union and provided Gonzales with a union authorization card. The following day, Operations Manager Williams spoke with Freire and told him "not to be discussing union issues on the clock or in the building." Freire acknowledged that he knew that he could talk about the Union at lunch and on break. Counsel for the Respondent asked Freire whether it was true that Williams had stated that he could not be talking about the Union when he was working. Freire acknowledged that he had. Williams denied telling any employees not to discuss the Union. I do not credit that denial. The prohibition against talking about the Union was exactly the prohibition that Henry had announced on July 18, 2001, equating discussion about the Union with solicitation. Williams reiterated the orally promulgated rule that Henry had announced on July 18. By prohibiting employees from talking about the Union except on nonworking time, while permitting other conversation, the Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that, on November 20, 2001, Williams interrogated employees regarding their communications with the Board and threatened unspecified reprisals if employees

cooperated in an investigation being conducted by the Board. Employee Thomas Roberts testified that this occurred before lunch as he was working "outside the compound." Several employees in the front office had been terminated. Roberts recalled that the conversation began when Operations Manager Williams asked him "what the scuttlebutt was about the firings." Roberts responded that some people were saying that the firings were over but others thought that more people were going to be fired. Williams responded that it "was only administration that was hit and that's all over with." Williams told Roberts that he "didn't like rumors" and that he was going to address one. He then stated that he "had heard that I had went to the NLRB, and I had went to the NLRB about him and like what did I have to say about that." Roberts responded that he did not know what Williams was talking about, that he had not gone to the NLRB. William responded that he did not know whether it was Roberts or another employee named Thomas Roberts who had a different middle initial, but that "it would all come out and once it did, . . . he would take care of it at that time once the information got to him."

Operations Manager Williams generally denied interrogating employees regarding their communications with the Board. He did not deny or address any conversation with Roberts in November. He did not deny threatening unspecified reprisals for cooperating with the Board in an investigation. Roberts was fully credible. His demeanor was impressive. His recollection was clear. In addressing several crucial matters, including whether Peter Mullins denied using any offensive language in an incident in October 2002, Williams testified that he had no independent recollection. I credit Roberts. When Roberts denied having gone to the Board, Williams noted that he was aware that there was another Thomas Roberts who had a different initial but that "it would all come out" and that he would "take care of it." The foregoing threat conforms the coercion inherent in the interrogation. By interrogating employees regarding their communications with the Board and threatening unspecified reprisals if employees cooperated in a Board investigation, the Respondent violated Section 8(a)(1) of the Act.

The complaint further alleges that, on or about December 11, 2001, Williams threatened to discharge employees if they cooperated in an investigation being conducted by the Board. The Union filed the charge in Case 12–CA–21696 on July 30, 2001. On December 11, employee George Freire was working at a desk when Operations Manager Williams walked through the room. According to Freire, Williams did not address him. Rather, Williams was speaking to himself out loud. The statement Freire recalls hearing was that, "if he found out who was going to the NLRB that there was going to be trouble." Williams did not make the statement to Freire, and Freire made no response. Unlike the direct threat to Roberts that he would "take care of it," the reference to "trouble" does not unambiguously establish that Williams would be the instigator of the unspecified trouble. Freire gave no context for the remark that he overheard. The record does not establish whether Williams' dialogue with himself referred to the charge that had been filed by the Union in July or to some other matter. Absent any context whatsoever, I cannot find that the foregoing ambiguous overheard comment threatened any employee with adverse action, much less discharge as alleged in the complaint. I shall recommend that this allegation be dismissed.

The final allegation relating to Operations Manager Williams is that, on June 18, 2002, he threatened the discharge of employees who supported the Union. On that date, employee Peter Mullins was called by Williams to the office because of a problem with the building automation system. Mullins identified the problem and he and Williams corrected it. Williams, who was soon to leave on vacation, commented that he would be "lost," without Mullins, and Mullins replied that he was not planning on going anywhere. Williams then stated to Mullins that if he and "Pam [Johnson] and the rest of the union supporters file for a new election, then you are going to be terminated." Mullins replied that he could not be terminated for "doing something legal." Williams then stated that the Company was going to terminate the leader, an apparent reference to Mullins, "and then the rest of you will get in line." Mullins asked who had told him that and Williams replied, "Sean Henry."

Williams, without addressing whether he had a conversation with Mullins shortly before going on vacation in June, denied threatening to discipline or discharge employees for engaging in union activities. He did not deny having a conversation with Henry in which Henry stated his intention to terminate Mullins if the Union sought an election. Mullins testified that, at the time, this conversation occurred, he had become concerned regarding his tenure as an employee. He made a contemporaneous note immediately following this conversation. Williams' general denial was unconvincing. I credit Mullins testimony, the details of which Williams did not deny, including the specific reference to employee Pam Johnson and Vice President Sean Henry. By threatening employees with discharge because of their support for the Union, the Respondent violated Section 8(a)(1) of the Act.

D. The Warnings of July 25, 2002

1. Facts

As set out above, the Company has a presumptively valid solicitation rule that prohibits solicitation by employees if either is working. On July 11, employee James Carpenter obtained permission from his supervisor to speak with Vice President Sean Henry "about this certain individual about bringing the union in." Henry recalls that Carpenter reported to him that Peter Mullins was "always . . . talking to me and telling me the merits of the Union. Telling me, you know, why I should join. Why I have to reaffirm it. Why I should get other people to join." Henry testified that Carpenter reported that initially it was "three, four, five times a week" but now it was "every time" he saw Mullins. Henry testified that Carpenter told him that he had told Mullins to leave him alone "dozens of times." Henry referred the matter to Director of Human Resources Fields.

On July 12, Henry, Fields, and Operations Manager Williams met with Carpenter who reported being "harassed and solicited" by Mullins. He specifically reported one incident. In that incident, which Carpenter placed in the breakroom at 7:30 on the morning of July 11, which was before Carpenter clocked in but after Mullins had begun work at 7 a.m., Carpenter and another employee went to the breakroom. Carpenter reported

that Mullins asked him why he would not join the Union. Carpenter said that he replied that he liked working for the Company, and that Mullins responded that the Union could negotiate a better raise for him. Carpenter said that he told Mullins that he was not interested and left. The memorandum of this meeting further notes that Carpenter reported that Mullins "confronts him about a labor union at least 3–5 times per week" and that it was interfering with his work. The memorandum does not reflect that he had ever stated to Mullins that he did not want to hear anything further about the Union.

Following this meeting, at Fields' request, Carpenter wrote a statement dated July 17, in which he states that "[f]or the past couple of weeks" he had "been stopped in the hallways" and "in the office inside the breakroom," an apparent reference to the breakroom inside the hockey operations office, by Mullins "about hav[ing] the Union back into this building." The statement notes that Carpenter is "getting tired" of being talked to about the Union. The statement reports the breakroom encounter in which Mullins asked him "about the Union" and, unlike the memorandum of the July 12 meeting, concludes by noting that Carpenter told Mullins, "I don't want to hear about it any more."

Although the statement was written 6 days after July 11, there is no evidence of any occasion after July 11 that Carpenter again complained about being approached by Mullins. Mullins testified that he never initiated a conversation about the Union with Carpenter, that Carpenter brought up the subject, that he was "confused, . . . afraid that . . . he was going to lose his job if he supported the Union." Regarding the conversation in the breakroom on July 11, Mullins recalled that Carpenter "brought up the subject about how his father-in-law had told him that he didn't need a union." Mullins responded, "Well, James, you know, in a perfect world you don't need a union . . . [but we are] already making a lot less money since Palace Sports and Entertainment eliminated the contract and, you know, we're not getting overtime after eight."

Fields, Henry, and Williams interviewed Mullins on July 18. Consistent with Mullins' testimony at the hearing, Henry recalls that Mullins stated: "I have no idea what he's [Carpenter's] talking about. You know, James is a member of the Union. He has a card in the Union. Any time I talk to him is only, you know, to answer his questions." Henry recalls that he noted that Carpenter claimed that he had asked Mullins to stop "countless times." Mullins replied, "I don't recall him ever asking me to stop."

Henry testified that Carpenter was "nervous" and "upset" on July 11, and that he believed him because he was "so detailed and . . . upset." Fields testified that she also believed Carpenter. When questioned as to whether she had ever accepted the word of Mullins over that of another employee, Fields cited only one incident, an occasion in which Mullins had complained that Operations Manager Williams and his assistant were smoking in the building. Further testimony established that Williams and the assistant admitted doing so, thus there was no conflict.

Counsel for the General Counsel questioned Fields regarding whether she would conclude that an employee was being harassed when an employee had continuously declined a fellow employee's invitations to dinner. Fields acknowledged that a critical consideration regarding any action she might take would be whether the employee had specifically told the other individual to stop, "that it was bothering her or offensive to her. It would depend."

On July 25, Mullins was issued two warnings. The first was a written warning for violation of the Company solicitation rule. It cites the incident on July 11 when Mullins was purportedly on worktime. It states that Mullins "asked an employee why he would not join a labor union," that the employee stated that he wanted to give the Company a chance, that Mullins told the employee that the Union could get him a better raise, and that the employee told Mullins that he was not interested and walked away. Mullins' written comment on the warning notes that the accusation was not true, that Carpenter was "already" a member. The second warning, a final written warning, was for violation of the policy against harassment. It states that "during the months of June and July" Mullins, "at least 3 to 5 times a week stopped him [Carpenter] in his work area and . . . 'intimidated' him about joining a labor union while he was on work time. The employee repeatedly asked Peter [Mullins] to stop ..., but Peter continued until the employee reported the harassment to his supervisor."

In testimony, Carpenter stated that Mullins had spoken with him about bringing the Union back and that he had replied that he wanted to give the Company a chance. Mullins replied "Okay." He testified that, a couple of weeks later, Mullins spoke with him again and that he replied, "No. I don't want it yet." [Emphasis added.] Carpenter testified that Mullins approached him on "several occasions" including when he was in the breakroom before clocking in and "even when I'm going from one job to another job . . . he approaches me and stops and asks me about the Union." Carpenter testified that, on those occasions, he replied, "I don't want to discuss it right at this moment." [Emphasis added.] He denied approaching Mullins about the Union. He acknowledged that, when Mullins spoke with him as he was walking from job to job, that Mullins did not physically restrain him. On cross examination, Counsel referred Carpenter to the statement he had written on July 17, and asked: "You have testified that he [Mullins] did this [approached about the Union] on several occasions, before you wrote this statement in front of you; was the frequency once a week?" Carpenter answered, "Yes."

Mullins testified that he did not have an official break time because of the nature of his job, that he had to respond when necessary. He recalled one occasion that he had stated to Operations Manager Williams over the two-way radio that he was on break and that Williams had responded "You're not on break; you answer any time there is an emergency." Williams did not deny the foregoing conversation and acknowledged that Mullins, "relative to his normal duties, . . . could go into the breakroom and get coffee and keep on going."

On October 2, Carpenter signed a union authorization card. Mullins testified that Carpenter requested the card. Carpenter admitted signing the card but denied that he had requested it. There is no evidence that he made any complaint to management on that occasion. Regardless of the circumstances surrounding the signing, Carpenter's signing of the card casts serious doubt upon his assertion that he informed Mullins that he

was not interested in the Union and supports Mullins' testimony that Carpenter was "confused."

2. Analysis and concluding findings

"Employees who engage in union activities are not immune from nondiscriminatory discipline when they violate lawful plant rules unrelated to employee Section 7 rights. . . . When an employee is disciplined for an alleged violation of a lawful rule while engaging in activity protected by Section 7 of the Act, the employer is not privileged to act upon a reasonable belief if, in fact, the employee is innocent of any wrongdoing." *Avondale Industries*, 333 NLRB 622, 640 (2001). As the Supreme Court stated in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." The burden of proof is upon the General Counsel to show that the employer's honest belief was mistaken, that the alleged misconduct did not in fact occur. *Avondale Industries*, supra at 640.

The first warning issued to Mullins on July 25 was for violation of the Respondent's solicitation rule The Respondent's brief states that, on July 11, Mullins "violated the solicitation policy by soliciting James Carpenter to sign a union card when Mullins was on working time." There is not an iota of evidence that Mullins asked Carpenter to sign a union card. Carpenter never made such an assertion. According to Carpenter, Mullins asked "why he would not join a labor union." Mullins wrote on the warning that this did not occur, that Carpenter was "already" a member. There is no evidence contradicting that comment. Carpenter was not asked, as Mullins testified, whether he had approached Mullins and mentioned that his father-in-law had stated that the employees did not need a union. I credit Mullins.

Even if I did not credit Mullins, the record does not establish that Mullins violated the Respondent's rule. Rules prohibiting solicitation during working time are presumptively valid. *Our Way*, 268 NLRB 394 (1983). The Respondent's rule, in pertinent part, states: "Solicitation of any kind, by one employee to another, is prohibited while either is working. Working time is when an employee's duties require that he/she be engaged in work tasks." Mullins duties did not require that he be engaged in work during the brief interval that he obtained coffee. Operations Manager Williams acknowledged that employees, including Mullins, get coffee in the morning and may take their coffee with them as they go from job to job. The Respondent argues that Mullins was not on break. Not to belabor the point, but the acknowledgement that employees are permitted to get coffee entails going to the coffee machine, waiting while the cup fills, and then returning to work. The reason for the no-solicitation rule, as stated in the rule, is that the Company "believe[s] that you should not be disturbed or disrupted in the performance of your job." The total time required for the entire conversation that Carpenter reported is 15 seconds. Although it seems unlikely that one employee questioning another at the coffee machine regarding why that employee did not support the Tampa Bay Lightning, the hockey team that plays at the facility, would constitute solicitation, the Respondent characterized Mullins' questioning of Carpenter regarding "why he would not join a labor union" as solicitation. Accepting that it did constitute solicitation, there was no disturbance or disruption in the performance of Mullins' work. He was not working. He was, as his supervisor permitted him to do, getting coffee.

I find that Mullins did not solicit Carpenter. Carpenter initiated the short conversation by referring to a statement made by his father-in-law to which Mullins replied with a prounion statement. I further find, regardless of who initiated the conversation, that Mullins did not violate the Respondent's solicitation rule because he was engaged in a nonwork activity, getting coffee, an activity in which his supervisor had permitted him to engage. The Respondent's warning of Mullins for violation of its solicitation rule violated Section 8(a)(1) of the Act.

The second warning, a final warning, also issued to Mullins on July 25, was for violation of the Respondent's harassment policy. It states that Mullins "intimidated" Carpenter "about joining a labor union" and that this occurred "at least 3 to 5 times a week even after the employee being harassed asked Peter [Mullins] to stop."

Although Henry testified that he believed Carpenter because he was "so detailed and . . . upset," examination of Carpenter's inconsistent statements reveals little detail. Henry did not consider that Carpenter may have been "nervous" and "upset" because he was fabricating a false report. As of July 25, the Respondent had three versions of Carpenter's account regarding his encounters with Mullins. The most extreme was Henry's recollection that Carpenter told him that Mullins was confronting him "every time" they saw each other and that Carpenter had requested him to stop "dozens of times." Carpenter did not repeat this account when he met with Henry, Fields, and Williams on July 12. He referred to encounters only 3 to 5 times a week and the memorandum does not reflect over what period this occurred. It also does not mention that Carpenter claimed that he had told Mullins to stop "dozens of times." The third account, Carpenter's written statement dated July 17, limits the encounters to the last "couple of weeks" and mentions that he said that he did not want to hear any more about the Union only on July 11. Mullins denied that he had approached Carpenter and asserted that he did not recall Carpenter ever asking him to stop talking to him about the Union. Notwithstanding the Respondent's decision to believe Carpenter, it did not seek to reconcile Carpenter's differing accounts.

The warning issued to Mullins states that Carpenter had "repeatedly asked Peter [Mullins] to stop talking to him about joining a labor union," although the only reference to repeated requests was in Carpenter's statement to Henry that he had asked Mullins to stop "dozens of times." The warning does not adopt the implicit assertion that Mullins would have to have approached Carpenter at least 24 times for the "dozens of times" statement to be correct. Carpenter's statement of July 17 reports that the conduct had been occurring only "[f]or the past couple of weeks," which would have been the first 2 weeks of July. The warning refers to conduct occurring in June and July, without specifying 2 weeks, and states that Carpenter had been "intimidated." The memorandum of July 12 reports that Carpenter felt "antagonized" and his statement of July 17 simply states that he was "getting tired" of being talked to about the Union.

Carpenter's testimony differs from the foregoing accounts. Contrary to the representation that Mullins was approaching him three to five times a week and then "every time" he saw him, Carpenter testified that Mullins approached him on "several occasions" and he agreed that the frequency was once a week. Prior to July 11, Carpenter testified that he had told Mullins, on one occasion, that he did not want the Union "yet" and, on another occasion, that he did not want to discuss it "right at this moment." His July 17 statement reports that, on July 11, he told Mullins that he did not want to talk about the Union. There is no evidence of any undesired contact between Mullins and Carpenter after July 11. Although Carpenter testified that, when approached, he would stop walking, he acknowledged that Mullins never sought to physically restrain him.

Mullins denied approaching Carpenter, and I credit his testimony. Even if Mullins had initiated conversations on some of the unspecified occasions to which Carpenter referred, Carpenter's testimony does not establish harassment. If he was walking somewhere when Mullins approached, he stopped; Mullins did not stop him. Henry, when addressing the employees on July 18, acknowledges telling the employees, "let's reserve that [solicitation] for when we are on breaks, when we are walking in the building." [Emphasis added.] Even assuming that Carpenter told Mullins that he did not want to discuss the Union "right at this moment," that statement did not put Mullins on notice that he did not want to discuss the Union at any time. Carpenter testified to no coercion and his own statement of July 17 reports only that he was "getting tired" of being talked to about the Union. I credit Mullins that Carpenter was confused and, as Mullins told Henry, that he spoke with Carpenter "to answer his questions." Even if I credit Carpenter that Mullins initiated the conversations once each week, Carpenter did not testify that he had told Mullins that he did not want to speak about the Union "dozens of times." Mullins, when interviewed, told the management officials that he did not recall Carpenter "ever asking me to stop." The memorandum of the meeting with Carpenter on July 12 reflects no statement by Carpenter that he had told Mullins that he did not want to talk about the Union. It was not until he wrote out his statement on July 17 that Carpenter claimed that he had told Mullins that he did not wish to engage in any such conversations on July 11. There is no evidence that Mullins approached Carpenter between July 11 and July 25 when he was issued the warning for harassment.

An employer may not characterize encounters in which one employee is advocating a union as harassment simply because the employee to whom prounion statements are directed "rejects them and feels 'bothered' or harassed' or 'abused' when fellow workers seek to persuade . . . about the benefits of unionization." *Frazier Industrial Co.*, 328 NLRB 717, 719 (1999), citing *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998). Carpenter's written statement reflects only that he was "getting tired" of being talked to about the Union. The General Counsel has established that the conduct for which Mullins was warned, harassment, did not occur. The warning of Mullins for engaging in conduct protected by the Act violated Section 8(a)(1).

The warnings issued to Mullins also violated Section 8(a)(3) of the Act. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), relates to dual or mixed motive cases. In the instant case, Mullins was warned for engaging in union activity, an adverse action relating to his terms and conditions of employment that discouraged union activity. By warning Mullins for engaging in union activity the Respodent violated Section 8(a)(3) of the Act.

E. The Discharge

1. Facts

Mullins was discharged on November 3 after Alice Castillo, an employee of SportService, a retail business that sells sports merchandising items from a store located within the facility, accused him of calling her a "Yankee bitch." Mullins and Castillo agree that he would, from time to time, drop by the store and that they would engage in conversation. Both Mullins and Castillo had grown up in New York City.

On October 21, the Union filed a petition for a representation election. The conversation between Mullins and Castillo occurred 2 days later, on October 23. Both agree that wages were discussed. Mullins recalls referring to a newspaper article relating to low job wages in Florida, that of "the 200,000 jobs a year created by Bush . . . most of them were below $20,000 per year." Castillo testified that Mullins "came to the store and was talking about unions. I asked . . . about pay scales in Alabama and Mississippi, [a]nd he called me a 'Yankee bitch."'

Castillo spoke with her husband, Antonio (Tony) Castillo, who is the Company's Director of Security, about the foregoing conversation. At his suggestion, she wrote out a statement and then reported her version of the incident to her assistant manager, identified in the record as "Jason," the following morning. Jason asked her to write out a statement. Castillo provided the statement that she had already written, and he typed it. The statement, after noting that conversations with Mullins were not unusual, states:

> Peter spoke to me about the union and the upcoming election. I replied he must be happy (I really don't know about union or union procedures). We then spoke of paychecks statewide and up north vs. the south. He told me he had a newspaper article he would bring up to me [to] read. I then replied, "Well what is the pay in other southern states like Alabama and Mississippi?" He then loudly called me "Yankee Bitch." He saw my surprised expression and quickly in a low voice said "Oh I'm a Yankee Asshole."
>
> Peter is at times disturbing and hostile. I feel disrespected by him and would like his behavior toward me to end. I would like him to just leave me alone and stay away from my work area.

The assistant supervisor forwarded that report to Bruce Ground, General Manager for SportService, who reported the incident to Palace Sports. Prior to the Company's receipt of the report, Vice President Henry heard about the incident directly from Castillo whom he happened to encounter while coming into the building. Director of Human Resources Fields initially testified that she learned of the incident from the memo from Bruce Ground but then amended that testimony to note that Tony Castillo had mentioned it to her the day after the incident.

Fields spoke with Alice Castillo who repeated that Mullins had called her a "Yankee bitch." Castillo also told Fields that "it had been going on for a long time and that she had just had enough." Castillo, when testifying, acknowledged that she had neither complained about nor reported any past alleged improper comments by Mullins. Furthermore, she did not inform Mullins that any statement that he had made offended her. In testifying to the "embarrassing things" that Mullins had purportedly previously said, she recalled that Mullins had referred to her as an "elitist" and "Miss Ivy League." She asserted that, on one occasion, "I don't remember why . . . he called me a 'fucking idiot.'" Mullins denied making the foregoing comment. Alice Castillo testified that she told her husband, Tony Castillo, who replied, "Peter's crazy. Just ignore him." He did not suggest that she report the comment. Tony Castillo testified that, when Mullins sought to speak with him after the purported "Yankee bitch" comment, he told Mullins, "Get the fuck out of my face." Thus, notwithstanding Mullins' denial of the "fucking idiot" comment, it appears that use of the "f" word is at least tolerated in the Company's workplace since an acknowledged supervisor used the word when addressing an employee.

Mullins heard from a fellow employee that Castillo was upset with him for making some objectionable comment. Mullins, who denied making the "Yankee bitch" comment, sought and says he received Tony Castillo's permission to apologize to his wife. He went to Alice Castillo and said, "Alice, if I said anything that was misconstrued, I am sorry. But I don't even know what I said that would have offended you." He asked Castillo what he had said, and she said, "bitch." Whether Mullins apologized with or without the permission of Tony Castillo is immaterial. It is uncontraverted that he apologized, that he made the apology before being interviewed about the incident, and that he reported that he had apologized when he was interviewed.

On October 31, Henry, Fields, and Williams met with Mullins. Henry testified that Mullins immediately stated that he did not say anything offensive to Castillo and that he had "heard a lot of things and I know this is all about the Union." Vice President Henry's "meeting notes," dated November 1, reflect that Fields conducted the meeting and began by stating, "[We] were not meeting to discuss any union issues" but were "meeting as part of an investigation into a complaint." Mullins interrupted, saying that he did not recall offending Castillo and that he had apologized for anything he might have said. Fields stated the alleged "Yankee bitch" comment, and Mullins stated that "he could not recall saying that," and that he was surprised that "people would say that he said such an offensive thing to a woman."

Henry's "meeting notes," before setting out Mullins' comments, inaccurately state that Castillo was "put into a very threatening position." Castillo's statement reports only that Mullins is, at times, "disturbing and hostile" and that this makes her feel "disrespected." The word "threatened" does not appear in her statement. Castillo testified that she was "[n]ot physically threatened," that she did not "feel like he [was] going to do something to me." The "meeting notes" also state that the conversation "quickly turned sour, and argumentative." Castillo's statement does not provide any basis for such a conclusion. In testimony Castillo stated that the conversation "wasn't argumentative or sour."

Fields asserted that she believed Castillo because Mullins did not deny making the comment "Yankee bitch." She acknowledged that Mullins stated that "he didn't recall saying that." She further acknowledged that she considered the statements "I don't recall" and "I don't recall saying that" to be different statements. She acknowledged that Mullins informed the management officials who were interviewing him that he had already apologized. She did not admit that there was any difference in saying "I'm sorry . . . if I said anything that may have offended you" and saying "I'm sorry . . . that I said something that offended you."

Fields testified that the Company terminated Mullins because he "made inappropriate comments and his conduct was inappropriate." When asked what was inappropriate about his conduct "as distinct from his comments," Fields testified that Castillo told her that Mullins was "up in her face, yelling in her face." Castillo's written statement, prepared the evening of the incident, reports only that Mullins spoke "loudly." Despite believing that Mullins called her Castillo a "Yankee bitch," Fields acknowledged, "I don't think he sexually harassed her."

As Williams accompanied Mullins to his locker following the termination, Mullins commented that "it was a set up. He knew it was coming." Williams did not reply.

On December 8, 2000, employee Anthony Medina, an employee in guest services, was warned following a report that he had used vulgar and profane language and complaints from customers about his rude behavior. Upon a repeat of the same conduct in January 2001, Medina was terminated. The Respondent argues that the record does not establish that Medina was not terminated for his December conduct and that Fields was not involved in that termination, implying that, if she had been, Medina would have been terminated for the first offense. Notwithstanding her absence of involvement, Fields was the Director of Human Resources at that time, having assumed her responsibilities in January of the year 2000. Furthermore, Sean Henry was in overall charge of the facility and had been since July 3, 1999.

2. Analysis and concluding findings

I credit Mullins that he did not make any offensive statement to Castillo. I find that Castillo misunderstood or misheard whatever comment he may have made, perhaps the reference to jobs created by "Bush." Despite this, as the Respondent correctly argues, it may "rely on its good-faith belief" in Castillo's version of the incident because Mullins was not engaged in protected activity. See *GHR Energy Corp.*, 294 NLRB 1011, 1013–1014 (1989). Thus, my analysis shall proceed on that basis.

In assessing the evidence under the analytical framework of *Wright Line*, supra, I find that Mullins engaged in union activity and that the Respondent was fully aware of that activity. I also find animus and specific animus towards Mullins. The discharge was an adverse action affecting the terms and conditions of his employment. I find that the General Counsel has carried the burden of proving that union activity was a substan-

tial and motivating factor for the Respondent's action. *Manno Electric*, 321 NLRB 278 (1996).

The General Counsel having established a prima facie case, the burden shifts to the Respondent to establish that Mullins would have been discharged in the absence of any union activity on his part. Thus, the Respondent "not only must separate its tainted motivation here from any legitimate motivation, but it must persuade that its legitimate motivation outweighs its unlawful motivation so much that the Company would have imposed the discipline even in the absence of any union activities." *Formosa Plastics*, 320 NLRB 631, 648 (1996).

Mullins, upon hearing that Alice Castillo was upset regarding something that he had purportedly said, immediately tried to set the situation right. Regardless of whether Tony Castillo granted him permission to do so, Mullins apologized to Alice Castillo for whatever offensive comment he may have made. Castillo had never informed Mullins that any prior comments that he may have made upset her in any way, and she had never previously made any complaint. Her statement requests that Mullins be directed to leave her alone. She acknowledged that she was surprised that he was discharged.

In *New Era Cap Co.* 336 NLRB 527 (2002), the Board addressed an alleged unlawful suspension and found, with one member dissenting, that the discipline was unlawful. In assessing the evidence the Board concluded as follows:

> . . . [E]ven were we to accept that some discipline was warranted, we would find, contrary to our colleague, that the punishment the Respondent chose was so disproportionately harsh as to suggest an illicit motive. We do not substitute our business judgment for that of the Respondent. Rather, under the Respondent's progressive discipline policy, Baldwin should have been verbally warned for a first violation. Only after the third incident would she have been suspended. Admittedly, the rules permitted the Respondent to vary the punishment for "gross misconduct." However, in the only other documented instance of punishment being imposed for harassment, ..., the punishment was a first step verbal warning.

Although Henry and the Respondent's brief characterize the "Yankee bitch" comment as sexual harassment, there is no evidence of any sexual advance by Mullins. Fields admitted that the use of the term did not constitute sexual harassment. The Respondent's "Rules of Conduct" prohibit the use of "indecent conduct or language" and set out a progressive disciplinary system beginning with an oral reprimand or written warning. The Respondent's rules note that "if repeated violations occur after corrective action had been taken . . . [t]ermination is the last step." [Emphasis added.] There had been no complaint that Mullins had not complied with the Respondent's prior, albeit unlawful, corrective action regarding approaching Carter. Neither Castillo nor any other employee had ever complained about any language that Mullins had used. Mullins, prior to any conversation with management, apologized to Castillo.

The only other documented incident regarding indecent conduct or language is the December 8, 2000, warning of Employee Medina for using vulgar and profane language towards customers. Medina was retained and not terminated until another incident in January 2001. The Respondent argues that there is no evidence that Medina was not discharged for his December conduct. That argument is belied by the fact that he was working in January and that the discharge document, dated January 10, 2001, states that "[o]n more than one occasion" problems had been addressed but that "matters have gotten worse."

In October 2002, the two leading union adherents employed by the Respondent were Peter Mullins and Pam Johnson. In June, 2001, local union president Lewis Taylor had, by his own admission, "screwed himself out of a good job." Former shop steward Andy Lalewicz had been promoted to management. On June 18, Operations Manager Carson Williams had told Mullins that if employee Pam Johnson and the rest of the union supporters filed for an election, "then you are going to be terminated," and that then the rest of the employees would "get in line." On October 21, the Union filed a petition for an election. Fields began the meeting with Mullins by stating, "[We] were not meeting to discuss any union issues," apparently in response to Castillo's statement that Mullins had mentioned the upcoming election. After his discharge, Mullins stated to Williams that "it was a set up," and Williams did not deny the assertion.

The General Counsel established that Mullins' union activity was "a substantial and motivating factor" in its action. The Respondent has not established that Mullins would have been discharged in the absence of his union activity. By terminating Peter Mullins because of his union activity the Respondent violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. By prohibiting employees from talking about the Union except on nonworking time while permitting other conversation, interrogating employees regarding their knowledge of employee union activity and directing them to report upon the union activities of their coworkers, interrogating employees regarding their communications with the Board and threatening unspecified reprisals if employees cooperated in a Board investigation, and threatening employees with discharge because of their support for the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By warning Peter Mullins on July 25, 2002, and discharging him on November 3, 2002, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily warned and discharged Peter Mullins, it must expunge those unlawful actions from his record and offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as

computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Palace Sports & Entertainment, Inc., d/b/a St. Pete Times Forum, Tampa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning, discharging or otherwise discriminating against any employee for supporting International Alliance of Theatrical Stage Employees, AFL–CIO, or any other union.

(b) Prohibiting employees from talking about the Union except on nonworking time, while permitting other conversation.

(c) Interrogating employees regarding their knowledge of employee union activity and directing them to report upon the union activities of their coworkers.

(d) Interrogating employees regarding their communications with the Board and threatening unspecified reprisals if employees cooperated in a Board investigation.

(e) Threatening employees with discharge because of their support for the Union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Peter Mullins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Peter Mullins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharge, and within 3 days thereafter notify Peter Mullins in writing that this has been done and that the warnings and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 22, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn, discharge, or otherwise discriminate against any of you for supporting International Alliance of Theatrical Stage Employees, AFL–CIO, or any other union.

WE WILL NOT prohibit you from talking about the Union except on nonworking time while permitting other conversation.

WE WILL NOT question you regarding your knowledge of employee union activity and WE WILL NOT direct you to report upon the union activities of your coworkers.

WE WILL NOT question you about your communications with the National Labor Relations Board and WE WILL NOT threaten

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

you with unspecified reprisals if you cooperate in a Board investigation.

WE WILL NOT threaten you with discharge because of your support for the Union.

WE WILL, within 14 days from the date of the Board's Order, offer Peter Mullins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Peter Mullins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and discharge of Peter Mullins and way.

WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings and discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

PALACE SPORTS & ENTERTAINMENT, INC., D/B/A ST. PETE TIMES FORUM